United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-1471 10/29

United States Court of Appeals
For the Second Circuit

ANTHONY M. LIPANI,
Plaintiff-Appellant,

v.

THE BOHACK CORPORATION,
Defendant-Appellee.

B
P/S

ROBERT LOESCH,
Plaintiff-Appellant,

v.

THE BOHACK CORPORATION,
Defendant-Appellee

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR THE DEFENDANT-APPELLEE

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ISSUE PRESENTED

Are returning veterans entitled under The Selective Service Act of 1967 to credit by their employer for vacation and sick leave allowance which, under the appropriate collective bargaining agreement, must be earned during the year, predicated upon actual work performed, and not by the mere passage of time?

STATEMENT OF THE CASE

This action for additional vacation and sick leave allowance, pursuant to Section 459 of the Military Selective Service Act, was commenced by Anthony E. LiPani and Robert Loesch (hereinafter referred to as "Appellants") on May 23 and May 24, 1974 respectively (23a; 3a). They seek damages in amounts representing vacation pay and sick leave based on seniority accrued while in military service. The actions were consolidated by stipulation (28a).

Appellants and appellee moved and cross moved for summary judgment on the stipulated facts, each relying on the law.

The District Court (Bartels, J.) granted appellee's motion for summary judgment and dismissed both complaints, based on the finding that the collective bargaining agreement to which appellants were subject required that a paid vacation for employees must be earned, and that there was no provision for vacation pay without actual work (53a-66a). The order of the District Court from which this appeal is taken was entered on December 26, 1973.

STATEMENT OF FACTS

The basic facts of this case are stipulated (54a).

Appellant LiPani was employed by Bohack from May 6, 1969 until July 14, 1969, when he entered military service. Upon his discharge from the armed forces, he was re-employed by Bohack on October 19, 1971, and by the end of the calendar year, had worked for Bohack a total of approximately four months and twenty days. In June, 1972, he received his first two-week paid vacation and full sick leave allowance. LiPani claims vacation and sick leave rights amounting to $717.60 for the year 1971.

Appellant Robert Loesch was employed by Bohack on

March 10, 1969 as a warehouseman and worked in that capacity until July 31, 1969 when he entered military service. Upon his discharge from military service Loesch was re-employed by Bohack on October 18, 1971. At the end of the calendar year 1971, Loesch had worked a total of approximately seven months and two days. In 1971 Loesch received a one-week vacation. In 1972 he received a two-week vacation and full sick leave allowance. Loesch claims vacation and sick leave rights amounting to $538.20 for the year 1971.

Both claims are founded on the allegation that in the case of each appellant, appellee failed to compute, in determining vacation and sick leave allowance for the year 1971, appellant's pay or allowance to "which he would have been entitled had he not entered the Armed Forces but remained continuously in the employ of defendant" (32a, 33a).

POINT I

THE DISTRICT COURT PROPERLY HELD THAT VACATION PAY AND SICK LEAVE ALLOWANCES ARE BENEFITS EARNED BY ACTUAL WORK PERFORMED.

The thrust of appellants' argument is that Bohack failed to comply with Section 459 of the Selective Service Act of 1967 (50 U.S.C. App. 459) in computing their vacation and sick leave allowances for the calendar year 1971 by failing to include time spent in the military during that year.

The relevant sections of the Act provide as follows:

"(b) *Reemployment rights*

> In the case of any such person who, in order to perform such training and services, has left or leaves a position . . . in the employ of any employer

and ... makes application for re-employment within ninety days after he is relieved from such training and service ...

. . .

(B) if such position was in the employ of a private employer, such person shall —

(i) ... be restored by such employer ... to such position or to a position of like seniority, status, and pay;

. . .

(C)(1) Any person who is restored to a position in accordance with the provisions of paragraph ... (B) of subsection (b) ... shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph ... (B) of subsection (b) ... should be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The pivotal question presented here is whether seniority status under the Act includes vacation pay and sick leave allowance, which must be earned by actual work and not by

the mere passage of time under the collective bargaining agreement to which appellants are subject.

The pertinent provisions of the collective bargaining agreement between Bohack and General Warehousemen's Union Local 852 clearly indicate under Articles X(A), (B), (C), (F), (G), (H) and (I), that vacation and sick leave allowance are predicated upon work actually performed and not by the mere passage of time (6a-16a).

The relevant provisions of the collective bargaining agreement are:

Article X — Vacations

(A) All full-time employees in the employ of the Company for a period of six (6) months of continuous working service shall receive one (1) week's vacation with pay. Employees in the employ of the Company for twelve (12) months or more shall receive two (2) weeks vacation with pay and one (1) week's scheduled sick leave as defined in Article XII (A). Employees in the employ of the Company five (5) years or more shall be entitled to a third week's vacation. Employees in the employ of the company ten years (10) or more shall be entitled to a fourth week's vacation. Employees in the employ of the Company twenty-five (25) years or more shall be entitled to a fifth week's vacation.

No employee shall receive a vacation with pay in any one calendar year in excess of the vacation period to which he is entitled above.

(B) Vacation pay shall be computed on the basis of the employees regular straight time weekly earnings including all premiums, if any.

Night shift premiums shall be included in vacation pay only if such employees regularly worked on night shift immediately preceding their vacations,

regardless of time on shift. This shall not apply to regular night shift employees who temporarily replace day shift employees due to vacations, illness, jury duty or death in family.

(C) In cases of promotions and demotions, voluntary or otherwise, the vacation rate shall be based on the employee's record three months prior to his vacation and he can qualify only if his higher rate was maintained for four (4) days a week during this three (3) month period.

. . . . .

(E) Vacations shall be given in consecutive weeks within the April 1st — September 30th vacation period.

(F) Any employee entitled to a vacation who is laid off for lack of work without receiving his vacation shall receive whatever vacation pay and sick leave which has been earned in the past year plus vacation pay and sick leave pro-rated on the basis of the period worked during the year of said interruption of employment.

. . . . .

(H) Any worker who shall complete a full year shall receive his two weeks vacation in that year and one (1) week sick leave, or more, if eligible under the provisions of this Contract. Vacations shall be selected on straight seniority disregarding job classifications, with the exception of hilo mechanics who shall select vacations within their own classification.

(I) Time not worked by an employee because of illness shall be considered time worked for the purpose of computing the vacation of such employee, provided such employee has worked a minimum of thirty (30) days during the year.

(J) Employees unable to work in a new year because of illness shall be paid vacation monies earned during the preceding year on a pro-rated basis. If any such employee becomes deceased, said monies shall be paid to the heir of the deceased employee.

. . . . .

Article XII — Sick Leave — Absenteeism

(A) The Company agrees to grant ten (10) days of sick leave in each calendar year for those employees who have completed at least one (1) calendar year of employment. For those employees who have less than one (1) calendar year of employment as of January 1st of any year, sick leave shall be pro rata until the beginning of the following calendar year. For those eligible for ten (10) days sick leave in each calendar year, five (5) of the ten (10) days may be taken as vacation, outside of the vacation period. The remaining five (5) days can only be taken as regular sick leave.

. . . . .

The notion that the Act provides a returning serviceman with an advantage or priority not otherwise accorded to non-veterans has been expressly rejected. *Tilton v. Missouri Pacific Ry.*, 376 U.S. 169, 181 (1964).

In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946), it was stated:

> "No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position mean no more." *Id.* 328 U.S. at 286.

It is respectfully submitted that *Kasmeier v. Chicago Rock Island and Pacific Railroad Co.*, 437 F.2d 151 (10th

Cir., 1971) correctly interprets the statute and Congressional intent in enacting the statute. The collective bargaining agreement in *Kasmeier* provided that an employee must render 110 days of compensated service in the previous calendar year in order to qualify for vacation rights. Kasmeier rendered only 53 days of such service in the year before 1967 after his release from the armed forces. The Tenth Circuit Court of Appeals upheld the railroad's denial of vacation pay for the year 1967. The court predicated its decision upon the language of Section 459(C) of the Selective Service Act categorizing vacation rights as "other benefits" based upon established rules and practices of the railroad. The court then concluded that since the collective bargaining agreement did not provide for vacation pay for its employees without the requisite number of days of compensated service, Kasmeier had no claim for vacation pay. The court states:

> "If Kasmeier were to prevail herein, the discrimination would favor the veteran. For without meeting the collective bargaining agreement standards as non-veterans must do, the returning veteran could merely assert that military duty kept him too long to work the 110 days, and he would therefore be entitled to a paid vacation." Id. at 155.

The recent decision of the Supreme Court in *Foster v. Dravo Corporation*, 420 U.S. 92, 95 S.Ct. 879 (1975), is directly on point.

There, the Court said (95 S.Ct. at 884):

> "These provisions lend substantial support to respondent's claim that the vacation scheme was intended as a form of deferred compensation. Petitioner's observation that an employee could in theory earn a vacation under the collective bargaining agreement with only a few carefully

spaced hours of work is not enough to rebut the plain indication that a full vacation was intended in most cases to be awarded for a full year's work.

On petitioner's theory of the case, the company would be required to provide full vacation benefits to a returning serviceman if he worked no more than one week in each year; *indeed, following this approach to its logical limits, a veteran who served in the armed forces for four years would be entitled to accumulated vacation benefits for all four years upon his return. This result is so sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor that the statute should be applied only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company.* Since no such showing was made here, and since petitioner has not met the bona fide work requirement, we conclude that §9 did not guarantee him full vacation rights for the two years in question." (Emphasis added)

Similarly, in this case, appellants have made no showing that vacations were intended to accrue as a function of continued association with the company.

Thus, Article X (B) establishes the computation of vacation pay based on work actually performed.

"(B) Vacation pay shall be computed on the basis of employees regular straight time weekly earnings including all premiums, if any.

Night shift premiums shall be included in vacation pay only if such employees regularly worked on night shift immediately preceding their vacations, regardless of time on shift. This shall not apply to regular night shift employees who

temporarily replace day shift employees due to vacations, illness, jury duty or death in family."

Article X (C) further establishes that vacation pay is related to actual work performed.

"(C) In cases of promotions and demotions, voluntary or otherwise, the vacation rate shall be based on the employee's record three months prior to his vacation and he can qualify only if his higher rate was maintained for four (4) days a week during this three (3) month period".

Article X (F) states that where an employee is laid off for lack of work his vacation pay shall be pro rated according to the period actually worked.

Such a direct and intimate connection with actual work performed establishes beyond a doubt that vacation pay is earned compensation, not a "function of continued association with the company."

The only exception to be noted in the agreement itself is that for employees who cannot work because of illness (Article x (I), (J)), thus indicating an awareness of the work related aspects of vacation. It is ludicrous for appellants to claim unused sick leave and ask at the same time to be placed in the same status as employees unable to work because of illness.

POINT II

VACATION PAY, AS DISTINGUISHED FROM SEVERANCE PAY, HAS BEEN HELD BY THIS COURT TO BE COMPENSATION FOR SERVICES RENDERED.

Appellants have relied to a great extent on cases involving severance pay provisions (see, e.g. *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1975) and

Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc., 490 F.2d 586 (2d Cir. 1976)).

This Court, however, has distinguished between severance pay and vacation pay. In a claim by terminated employees that vacation pay and severance pay constituted an administration claim in a Chapter XI proceeding, this Court discussed the difference between the two types of compensation.

The Court said in *Straus-Duparquet, Inc. v. Local Union No. 3*, 386 F.2d 649 (2nd Cir., 1967) at 650:

> "We hold that the total of the claimed vacation pay is not properly classified as an expense of administration. Vacation pay is generally regarded as earned from day to day over the period of a year intervening between vacations. L. O. Koven & Brother, Inc. v. Local Union No. 5767, 381 F.2d 196 (3d Cir. 1967); In the Matter of Ad Service Engraving Co., 338 F.2d 41 (6th Cir. 1964); United States v. Munro-Van Helms Co., 243 F.2d 10 (5th Cir. 1957); Division of Labor Law Enforcement, etc. v. Sampsell, 172 F.2d 400 (9th Cir. 1949); Kavanas v. Mead, 171 F.2d 195, 6 A.L.R. 2d 645 (4th Cir. 1948); In re Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947). That this rule is not merely a fiction applied exclusively to bankruptcy proceedings is indicated by cases and arbitration awards in which employees whose employment has been terminated before their vacations were due have been held to be entitled to vacation pay 'accrued' to the date of termination. See Leon v. Detroit Harvester Co., 363 Mich. 366, 109 N.W.2d 804 (1961); Textile Workers Union, etc. v. Brookside Mills, Inc., 203 Tenn. 71, 309 S.W.2d 371 (1957); Livestock Feeds, Inc. v. Local Union No. 1634, 221 Miss. 492, 73 So. 2d 128 (1954);

Hampton Corporation and Boot and Shoe Workers Union, 39 L.A. 177 (Davis, 1962); Foster Refrigerator Corporation and International Union of Electrical, Radio and Machine Workers, 39 L.A. 241 (Altieri, 1962); Brookford Mills and Textile Workers Union, 28 L.A. 839 (Jaffee, 1957).

Under this theory claimants are entitled to priority for vacation pay as an expense of administration only to the extent of the proportionate part of total vacation pay earned during the period from the beginning of the bankruptcy administration to the date of termination of employment. Of course claimants are entitled to priority under Section 64a(2) for wages earned during the three months preceding bankruptcy to the extent of three-twelfths of total vacation pay, is merely a general claim entitled to no priority.

(2) Severance pay was properly held to be an expense of administration. Severance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is served, the full severance pay is due whenever termination of employment occurs. Severance pay is

> 'a form of compensation for termination of the employment relation, for reasons other than the displaced employees' misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense him for certain losses attributable to the dismissal.'
>
> Adams v. Jersey Central Power & Light Company, 21 N.J. 8, 13-14, 120 A.2d 737, 740 (1956)."

This clear recognition that vacation pay accrues for work actually done is, we submit, dispositive of this case.

POINT III

APPELLANTS ARE ENTITLED TO ONLY A GENERAL UNSECURED CLAIM AGAINST THE APPELLEE'S ESTATE

Appellee, as a debtor in possession under the aegis of the United States District Court, Eastern District of New York (74B933) is subject to suits and judgments only pursuant to the terms of the Bankruptcy Act. Appellants have filed a claim in the Chapter XI proceeding claiming a preference under Section 64(a) (2) of the Bankruptcy Act. This Court, in *Straus-Duparquet, supra,* at p. 651, stated that vacation pay claims had general creditor status, except as further protected by Section 64(a) (2) of the Act. That section gives priority to pay earned within three months of the date of filing of the petition. Appellants claim pay earned in 1971, and appellee's petition was filed on July 30, 1974. Therefore, we submit, appellants' status is that of general creditors only, assuming that there is any validity to their claims.

CONCLUSION

THE ORDER GRANTING SUMMARY JUDGMENT FOR APPELLEE SHOULD BE AFFIRMED.

October 29, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 29 day of Oct. 1976 deponent served the within Brief upon

William J. Kilberg, Solicitor of Labor; Harold C. Nystrom, Associate Solicitor, Bobbye D. Spears, Sofia P. Peters, William H. Berger, Attorneys

attorney(s) for

Appellants

in this action, at

Department of Labor
Washington, D.C. 20210

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 29 day of Oct. , 1976

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978